

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 SHELBY RAMSEY, Individually and on
12 Behalf of All Others Similarly Situated,

13 Plaintiff,

14 vs.

15 CARDTRONICS USA, INC., et al.,

16 Defendants.

CASE NO. 11-CV-1511 BEN (BLM)

**ORDER GRANTING IN PART
MOTION FOR SUMMARY
JUDGMENT**

[Docket No. 23]

17 Presently before the Court is a Motion for Summary Judgment by Defendants Cardtronics
18 USA, Inc. and Cardtronics, Inc. (collectively, "Cardtronics"). (Docket No. 23.) For the reasons stated
19 below, summary judgment in favor of Cardtronics is **GRANTED IN PART**.

20 **BACKGROUND**

21 Cardtronics owns and operates over 45,000 ATMs across the United States. (Statement of
22 Material Facts ("SMF") [Docket No. 23-2] ¶ 1.) Cardtronics maintains a policy to ensure that posted
23 notices, called "Network Decals," are attached to its ATMs. (*Id.* ¶ 4.) The Network Decals serve two
24 purposes: (1) to provide a fee notice, and (2) to list the participating ATM networks that can be
25 accessed using the ATM. (*Id.* ¶¶ 6-8.) The Network Decals are attached to the ATMs using a strong
26 epoxy, which is applied to a sticker made from polycarbonate. (*Id.* ¶¶ 55-56.) The sticker has a strong
27 adhesive backing that will likely not become detached from the ATM without human intervention.
28 (*Id.* ¶ 55.)

1 All ATMs owned by Cardtronics are brought to Cardtronics' warehouse in Houston, Texas,
2 for pre-installation programming, configuration, and set-up ("staging"). (*Id.* ¶¶ 9-10.) A standard
3 form, titled "Cardtronics Prep/Re-Furb Work Order," lists the possible staging tasks that may be
4 required for an ATM. (*Id.* ¶¶ 12-13.) A Cardtronics employee in the Program Management team
5 reviews the bill of material and the specifications of the customer that will house the ATM, then
6 customizes the Work Order to include the proper components, quantity numbers, and model numbers.
7 (*Id.* ¶¶ 14-15.) Every Work Order that is generated requires that a Network Decal be placed on the
8 ATM. (*Id.* ¶ 16.)

9 Next, the Work Order is sent to a technician at the Cardtronics warehouse. (*Id.* ¶ 17.) The
10 technician uses the Work Order as a roadmap for what features are required for the ATM, and makes
11 changes to the ATM accordingly. (*Id.* ¶ 18.) Another Cardtronics employee, typically the shipping
12 and receiving clerk, will check off that the required tasks have been completed on the Work Order
13 before the ATM is shipped out. (*Id.* ¶ 19.)

14 After the ATM is staged, it is shipped to its permanent location for installation. (*Id.* ¶ 21.)
15 Cardtronics uses third-party vendors to install the ATMs on-site. (*Id.* ¶ 22.) The installation vendors
16 must use a standard Cardtronics form titled "Installation Authorization" as a checklist during
17 installation. (*Id.* ¶ 23.) The Installation Authorization contains a section relating to "Installation
18 Details," which asks the technician whether the Network Decal has been applied to the ATM. (*Id.*
19 ¶¶ 24-25.) The Installation Authorization also asks whether the technician has taken a picture of the
20 installed ATM. (*Id.* ¶ 27.)

21 The vendor then sends the completed Installation Authorization and pictures to Cardtronics
22 with its invoice for payment. (*Id.* ¶ 28.) Once the materials are received, the Merchant Scheduling
23 team reviews the form for completeness and for any discrepancies with the ATM. (*Id.* ¶ 29.) If there
24 is a problem, the Cardtronics employee works with the vendor to fix the problem. (*Id.* ¶ 30.) For
25 instance, if the Network Decal is missing, Cardtronics sends a Network Decal to the vendor to be
26 applied to the ATM. (*Id.* ¶ 31.)

27 If the ATM is owned by an independent store but will be operated under contract by
28 Cardtronics, a similar process is used. The staging process does not occur in the Cardtronics

1 warehouse, but rather, the ATM is shipped directly from the manufacturer to the installation site. (*Id.*
2 ¶¶ 32-33.) Cardtronics sends the third-party vendor the materials that would have been used during
3 the staging process, including the Network Decal. (*Id.* ¶ 34.) The vendor then stages and installs the
4 ATM, using the Installation Authorization form. (*Id.* ¶¶ 35-36.)

5 If an existing ATM is replaced, Cardtronics uses different terminology for the on-site process.
6 Instead of referring to "installation," Cardtronics refers to "reprogram." (*Id.* ¶ 37.) The ATM that is
7 already on-site is reprogrammed using the same basic process that is followed in the Cardtronics
8 warehouse. (*Id.* ¶ 39.) Cardtronics sends a Network Decal to the third-party vendor for application
9 to the ATM. (*Id.* ¶ 40.) The technician performing the on-site reprogram uses a form titled
10 "Reprogram Authorization." (*Id.* ¶ 41.) The relevant portions of the Reprogram Authorization are
11 similar to the Installation Authorization, but use different terminology. (*Id.*) The Reprogram
12 Authorization asks whether the "Surcharge/Network decal" has been applied. (*Id.* ¶ 42.) In addition,
13 the Reprogram Authorization asks the technician to take a picture of the installed ATM. (*Id.* ¶ 43.)

14 When Cardtronics dispatches vendors to ATMs for repair, maintenance, or cash replacement,
15 Cardtronics instructs its vendors to only complete the work authorized by Cardtronics. (*Id.* ¶ 52.)
16 Cardtronics does not instruct its vendors to remove the Network Decals, except where a new one is
17 provided to replace an older one. (*Id.* ¶ 53.)

18 Cardtronics' procedures for ensuring that Network Decals are affixed to its ATMs are highly
19 successful. Cardtronics is currently auditing its ATMs in order to place Braille instructions on each
20 ATM. (*Id.* ¶ 44.) As part of this process, Cardtronics has instructed its vendors to check whether the
21 ATMs have Network Decals, and to identify those with missing Network Decals so that Cardtronics
22 can place new ones on those ATMs. (*Id.* ¶¶ 47-48.) Of the 8,877 ATMs that Cardtronics has visited,
23 87 were missing Network Decals. (*Id.* ¶ 49.) In other words, over 99% of the ATMs had Network
24 Decals. (*Id.* ¶ 50.)

25 The ATM at issue here is located on Fifth Avenue in San Diego, California. (*Id.* ¶ 60.) The
26 ATM is owned by an independent merchant, and Cardtronics operates the ATM under a contract with
27 the merchant. (*Id.* ¶ 61.) According to Cardtronics' records, a Cardtronics vendor placed a Network
28 Decal on the ATM during a June 2008 reprogram. (*Id.* ¶ 62.) In June 2010, the merchant replaced the

1 ATM with a new ATM. (*Id.* ¶ 63.) Cardtronics' records show that Cardtronics provided the vendor
 2 who reprogrammed the new ATM with another Network Decal, along with instructions to place the
 3 Network Decal on the ATM. (*Id.* ¶ 64.) The installation notes indicate that the process was
 4 completed. (*Id.* ¶ 65.) In April 2011, the merchant contacted Cardtronics to report that the Network
 5 Decal was missing. (*Id.* ¶ 66.) Cardtronics sent the merchant a replacement Network Decal four days
 6 later. (*Id.* ¶ 67.)

7 Plaintiff Shelby Ramsey filed the present action on July 7, 2011. (Docket No. 1.) The
 8 complaint asserts two claims: (1) violation of 15 U.S.C. § 1693 *et seq.* and 12 C.F.R. 205 *et seq.*
 9 against all defendants, and (2) violation of California Business & Professions Code § 17200 against
 10 all defendants. Presently before the Court is Cardtronics' Motion for Summary Judgment. Being fully
 11 briefed, the Court finds the Motion suitable for determination on the papers without oral argument,
 12 pursuant to Civil Local Rule 7.1.d.1.

13 DISCUSSION

14 Summary judgment must be granted where the record shows "there is no genuine dispute as
 15 to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a);
 16 *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must "persuade the
 17 court that there is no genuine issue of material fact." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.,*
 18 *Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the moving party satisfies this burden, the
 19 nonmoving party must go beyond the pleadings to demonstrate specific material facts that give rise
 20 to a genuine issue. *Celotex Corp.*, 477 U.S. at 324. "These principles apply equally whether summary
 21 judgment is granted on the merits of the claim, or on an affirmative defense." *Buttry v. Gen. Signal*
 22 *Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995); *see also Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507,
 23 1514 (9th Cir. 1994).

24 I. THE ELECTRONIC FUND TRANSFER ACT

25 The Electronic Fund Transfer Act ("EFTA") governs many types of electronic fund transfers,
 26 including ATM transfers. *See* 15 U.S.C. § 1693a(7). The EFTA "require[s] any automated teller
 27 machine operator who imposes a fee on any consumer for providing host transfer services to such
 28 consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the

1 service is provided) of—(i) the fact that a fee is imposed by such operator for providing the service;
2 and (ii) the amount of any such fee.” 15 U.S.C. § 1693b(d)(3)(A); *see also* 12 C.F.R. 205.16(b).
3 Subparagraph B requires that notice be provided both on the machine and on the screen. 15 U.S.C.
4 § 1693b(d)(3)(B); *see also* 12 C.F.R. § 205.16(c). The notice on the machine must state either that
5 (1) a fee *will* be imposed, or (2) if there are circumstances in which a fee will not be imposed, that a
6 fee *may* be imposed. 12 C.F.R. § 205.16(c). No fee may be imposed unless these notice requirements
7 are met. 15 U.S.C. § 1693b(d)(3)(C); 12 C.F.R. § 205.16(e). Customers may recover statutory
8 damages under the EFTA. 15 U.S.C. § 1693m(a).

9 Cardtronics does not dispute that the ATM at issue here charged customers a fee, that it was
10 required to post a fee notice on the ATM, or that such a fee notice was missing from the ATM. Rather,
11 Cardtronics argues that it is shielded from liability under two affirmative defenses: the bona fide error
12 defense and the safe harbor defense. As the safe harbor defense shields Cardtronics from liability, the
13 bona fide error defense need not be addressed.

14 A. Safe Harbor Defense

15 The safe harbor defense is applicable to the ATM at issue here because there is evidence that
16 a fee notice was originally affixed to the ATM. The safe harbor defense provides: “If the notice
17 required to be posted pursuant to section 1693b(d)(3)(B)(i) of this title by an automated teller machine
18 operator has been posted by such operator in compliance with such section and the notice is
19 subsequently removed, damaged, or altered by any person other than the operator of the automated
20 teller machine, the operator shall have no liability under this section for failure to comply with section
21 1693b(d)(3)(B)(i) of this title.” 15 U.S.C. § 1693h(d).

22 The business records for the ATM at issue establish that Cardtronics applied the required fee
23 notice to the machine. A Cardtronics vendor placed a Network Decal on the ATM during a June 2008
24 reprogram. (SMF ¶ 62.) When the merchant replaced the ATM with a new ATM in June 2010,
25 Cardtronics provided the vendor who reprogrammed the new ATM with another Network Decal, along
26 with instructions to place the Network Decal on the ATM. (*Id.* ¶¶ 63-64.) The installation notes
27 indicate that the process was completed. (*Id.* ¶ 65.) In April 2011, the merchant contacted Cardtronics
28 to report that the Network Decal was missing. (*Id.* ¶ 66.) Cardtronics sent the merchant a replacement

1 Network Decal four days later. (*Id.* ¶ 67.)

2 In addition, Cardtronics did not remove the Network Decal. Cardtronics documents the
3 changes it makes to its ATMs, and has no record of removing the Network Decal on the ATM at issue
4 here. Cardtronics does not typically require that the Network Decals be removed and updated with
5 new ones. (*Id.* ¶ 54.) Cardtronics also documents changes made by its vendors, and has no record of
6 its vendor removing the Network Decal from the ATM at issue. Through this undisputed evidence,
7 Cardtronics has established that the Network Decal was removed by a third-party. *See Piontek v. Penn*
8 *Sec. Bank & Trust Co.*, No. 10-cv-1038, 2011 WL 1002194, at *4 (M.D. Pa. Jan. 31, 2011)
9 (photographs and affidavit stating that no one in the company would have removed the on-machine
10 notice adequately established a defense under § 1693h(d)).

11 Plaintiff has not offered evidence to rebut these facts. Accordingly, Cardtronics is shielded
12 from liability by the safe harbor defense. *See Piontek*, 2011 WL 1002194, at *4 (granting summary
13 judgment on safe harbor defense to an ATM operator where “defendant’s affidavit and photos tend
14 to show that the required external notice was posted on the ATM in question and that the notice was
15 removed by some third party”).

16 **B. Plaintiff’s Opposition**

17 Plaintiff does not address Cardtronics’ arguments on their merits. Rather, Plaintiff makes a
18 procedural request under Federal Rule of Civil Procedure 56(d) for additional discovery to support
19 their opposition.

20 The Scheduling Order established that the first phase of discovery in the instant action had to
21 be completed on or before January 6, 2012. (Scheduling Order [Docket No. 10], at 3 ¶ 6.) It required
22 that all discovery be served in time so that responses would be due by January 6, 2012. (*Id.*) Written
23 discovery therefore had to be served by December 7, 2011. (*See id.*) On December 8, 2011, Plaintiff
24 served Cardtronics with Plaintiff’s First Set of Interrogatories and First Request for Production of
25 Documents. (Golovach Decl. [Docket No. 31-1] ¶ 3.) On January 9, 2012, Cardtronics served its
26 responses to Plaintiff’s written discovery. (*Id.* ¶ 4.) In response to each of the interrogatories and
27 document requests, Cardtronics claimed that Plaintiff’s written discovery “was untimely served
28 pursuant to paragraph 6 of the Case Management Conference Order Regulating Discovery And Other

1 Pretrial Proceedings (Dkt. [10]), and that no response is therefore required.” (*Id.*)

2 Plaintiff argues that because Cardtronics has not provided substantive responses to her written
3 discovery requests, she is unable to “present facts essential to justify the opposition to the Motion.”
4 (Opp. [Docket No. 31] at 2.) Plaintiff argues that the Court should grant her relief pursuant to Rule
5 56(d) (“If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present
6 facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2)
7 allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate
8 order.”). In addition, she argues that her written discovery was untimely because of a calendaring
9 error, and such a calendaring mistake falls within the parameters contemplated by Federal Rule of
10 Civil Procedure 60(b)(1).

11 As explained above, the Scheduling Order established that the first phase of discovery in the
12 instant action had to be completed on or before January 6, 2012. Under Federal Rule of Civil
13 Procedure 16(b)(4), “[a] schedule may be modified only for good cause and with the judge’s consent.”
14 Therefore, a party must demonstrate “good cause” for an extension of discovery. FED. R. CIV. P.
15 16(b)(4); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). Plaintiff’s failure to
16 conduct discovery is not a “good cause” to allow more time for discovery, especially where discovery
17 closed two months earlier. *Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*,
18 No. 10-cv-0677, 2011 WL 455896, at *1-2 (S.D. Cal. Feb. 1, 2011) (no good cause where party sought
19 relief approximately one month after close of discovery); *Justin v. City & Cnty. of San Francisco*, No.
20 C 05-4812, 2008 WL 544466, at *3-4 (N.D. Cal. Feb. 26, 2008) (no good cause where plaintiffs
21 waited until end of discovery to seek depositions and delayed in seeking extension of discovery
22 period).

23 In addition, Plaintiff failed to timely move to compel Cardtronics to respond to her discovery
24 requests. According to the Scheduling Order, any motion to compel was required to be filed by
25 February 6, 2012. (Scheduling Order [Docket No. 10], at 3 ¶ 6 (“In addition, all discovery motions
26 must be filed within thirty (30) days after the close of discovery.”).) Plaintiff, however, did not request
27 that additional discovery be conducted until she filed her opposition brief on March 5, 2012, a month
28 after the deadline had passed. Her failure to move to compel Cardtronics’ discovery responses is a

1 lack of diligence that bars her claim under Rule 56(d). *See Bank of Am., NT & SA v. PENGWIN*, 175
 2 F.3d 1109, 1117-18 (9th Cir. 1999) (party's failure to timely move to compel discovery, despite
 3 knowing about other party's refusal to produce documents, was grounds to not allow additional
 4 discovery under Rule 56(f)).¹

5 Plaintiff's request for relief under Rule 56(d) fails for several reasons. First, Plaintiff must
 6 make a motion under Rule 56(d) for a continuance and for leave to conduct additional discovery; she
 7 may not raise a request for relief under Rule 56(d) in an opposition brief. *Brae Transp., Inc. v.*
 8 *Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) ("References in memoranda and declarations
 9 to a need for discovery do not qualify as motions under Rule 56(f). Rule 56(f) requires affidavits
 10 setting forth the particular facts expected from the movant's discovery. Failure to comply with the
 11 requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary
 12 judgment."); *see also Weinberg v. Whatcom Cnty.*, 241 F.3d 746, 751 (9th Cir. 2001) (affirming denial
 13 of Rule 56(f) request and finding that inclusion of request in opposition brief was "plainly
 14 inadequate"). Here, Plaintiff has not made a motion for a continuance or for leave to conduct
 15 additional discovery, but rather refers to the need for additional discovery in her opposition to
 16 Cardtronics' Motion for Summary Judgment.

17 Second, a party may only be granted relief under Rule 56(d) if the party has previously been
 18 diligent in conducting discovery. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 (9th
 19 Cir. 2006) (affirming denial of former Rule 56(f) request because "plaintiff's prior discovery efforts
 20 were not diligent"). Here, Plaintiff has not been diligent, as she has not timely served discovery. As
 21 explained above, the Scheduling Order required that all written discovery be served by December 7,
 22 2011, in order for responses to be due by January 6, 2012. Although Plaintiff had seven months to
 23 serve discovery requests, Plaintiff did not serve written discovery until December 8, 2011, a day after
 24 the deadline. Because Plaintiff has failed to take discovery, she may not request additional discovery.
 25 *Brae Transp.*, 790 F.2d at 1443 ("Having taken no discovery, [plaintiff] can hardly argue at this late
 26

27 ¹ Rule 56(d) was formerly Rule 56(f). "Subdivision (d) carries forward without substantial
 28 change the provisions of former subdivision (f)." FED. R. CIV. P. 56, Committee Notes on
 Rules—2010 Amendment. Precedent under Rule 56(f) applies to Rule 56(d). *See Roberts v. McAfee,*
Inc., 660 F.3d 1156, 1169 (9th Cir. 2011).

1 date that the district court abused its discretion in ruling on the summary judgment in light of the fact
 2 that [plaintiff] itself failed to pursue the procedural remedy which the Federal Rules so clearly
 3 provided.” (internal quotation marks omitted).)

4 In regards to Plaintiff’s invocation of Rule 60(b)(1), Rule 60 does not apply here. Rather, Rule
 5 60 applies to a “final judgment, order, or proceeding.” See FED. R. CIV. P. 60(b) (“On motion and just
 6 terms, the court may relieve a party or its legal representative from a final judgment, order, or
 7 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.”);
 8 *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 (9th Cir. 2010). The applicable rule here is
 9 Rule 16, as discussed above. See *Hoffman v. Tonnemacher*, No. CIV F 04-5714, 2007 WL 2318099,
 10 at *1 n.1 (E.D. Cal. Aug. 10, 2007) (request to modify pre-trial order should be brought under Rule
 11 16, rather than Rule 60(b)).

12 Lastly, Plaintiff incorporates the arguments made by Plaintiff Sheryl Johnson in her Opposition
 13 to Cardtronics’ Motion for Summary Judgment (Docket No. 38) in the related action, *In re:*
 14 *Cardtronics ATM Fee Notice Litigation*, Case No. 11-MD-2245 BEN (BLM). As explained in the
 15 Order Denying Summary Judgment (Docket No. 75), these arguments fail. Accordingly, Cardtronics’
 16 motion for summary judgment is **GRANTED** on the first claim.

17 II. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17200

18 The second claim alleges violation of California Business and Professions Code Section 17200.
 19 Although Cardtronics moves for summary judgment on all claims brought by Plaintiff, neither party
 20 addresses the second claim in their briefing. Accordingly, Cardtronics is granted leave to file
 21 supplemental briefing addressing this claim within fourteen (14) days from the date of this order.
 22 Plaintiff may file an opposition within fourteen (14) days from the date of the filing of Cardtronics’
 23 supplemental briefing, and Cardtronics may file a reply within seven (7) days from the date of the
 24 filing of Plaintiff’s opposition.
 25

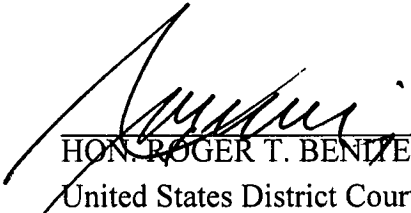
26 CONCLUSION

27 For the reasons set forth above, summary judgment in favor of Cardtronics is **GRANTED** on
 28 the first claim for violation of the Electronic Fund Transfer Act.

1 Cardtronics is **GRANTED** leave to file supplemental briefing addressing the second claim for
2 violation of the California Business and Professions Code Section 17200 within fourteen (14) days
3 from the date of this order. Plaintiff may file an opposition within fourteen (14) days from the date
4 of the filing of Cardtronics' supplemental briefing, and Cardtronics may file a reply within seven (7)
5 days from the date of the filing of Plaintiff's opposition.

6 **IT IS SO ORDERED.**

7 DATED: May 11, 2012

8 
9 HON. ROGER T. BENITEZ
United States District Court Judge